23

(2)

No. 08-1065

Supreme Court, U.S.
FILED
MAR 17 2009
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

POTTAWATTAMIE COUNTY, IOWA,
JOSEPH HRVOL,
DAVID RICHTER,

Petitioners,

v.

TERRY J. HARRINGTON,
CURTIS W. McGHEE, JR.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT TERRY J. HARRINGTON

J. DOUGLAS MCCALLA
Counsel of Record
MEL C. ORCHARD, III
LARISSA A. MCCALLA
THE SPENCE LAW FIRM, LLC
P.O. Box 548
15 S. Jackson St.
Jackson, WY 83001
(307) 733-7290

Attorneys for Respondent
Terry J. Harrington

221686

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

Whether this Court's prosecutorial immunity precedent may be expanded to retrospectively extend absolute immunity to prosecutors' investigative functions that deprived Harrington's fundamental liberty interests because the same prosecutors who conspired with police, investigated the crime, fabricated evidence, coerced testimony, and disregarded evidence implicating a Caucasian suspect all *before* they had probable cause to arrest Harrington were also the same prosecutors who prosecuted the crime and procured the conviction against the African-American teenager.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF CITED AUTHORITIES	iii
CONSTITUTIONAL PROVISIONS INVOLVED	1
INTRODUCTION	2
PROCEDURAL BACKGROUND	6
FACTUAL BACKGROUND	10
REASONS FOR DENYING THE PETITION	11
I. No Circuit Split Exists	11
II. Petitioners' Substantive Due Process Argument Is Meritless	24
CONCLUSION	31

TABLE OF CITED AUTHORITIES

Page

CASES

Albright v. Oliver,
510 U.S. 266 (1994) 26, 27, 29

Aretakis v. Durivage,
No. 1:07-CV-1273, 2009 WL 249781
(N.D.N.Y. Feb 03, 2009) 15

Botello v. Gammick,
413 F.3d 971 (9th Cir. 2005) 16

Brady v. Maryland,
373 U.S. 83 (1963) 4, 5, 8, 27

Buckley v. Fitzsimmons,
509 U.S. 259 (1993) ..... *passim*

Buckley v. Fitzsimmons,
20 F.3d 789 (7th Cir. 1994),
cert. denied, 513 U.S. 1085 (1985) ..... *passim*

Burns v. Reed,
500 U.S. 478 (1991) 16, 18

Carter v. City of Philadelphia,
181 F.3d 339 (3d Cir.),
cert. denied, 528 U.S. 1005 (1999) 17

CBOCS West, Inc. v. Humphries,
__ U.S. __, 128 S. Ct. 1951 (2008) 19, 22

Cited Authorities

Page

Clinton v. Jones,
520 U.S. 681 (1997) 14

County of Sacramento v. Lewis,
523 U.S. 833 (1998) 25

Daniels v. Williams,
474 U.S. 327 (1986) 25, 28

Dent v. West Virginia,
129 U.S. 114 (1889) 28

DeReyes v. Wilkins,
528 F.3d 790 (10th Cir. 2008),
cert. denied, __ S. Ct. __, 2009 WL 498175
(March 2, 2009) 29

Harrington v. Nix,
983 F.2d 872 (8th Cir. 1993) 8

Harrington v. State,
659 N.W.2d 509 (Iowa 2003) 8, 10, 30

Harrington v. Wilber,
353 F.Supp.2d 1033 (S.D. Iowa 2005) 6, 11

Heck v. Humphrey,
512 U.S. 477 (1994) 29, 30

Imbler v. Pachtman,
424 U.S. 409 (1976) ..... *passim*

Cited Authorities

Page

Kalina v. Fletcher,
522 U.S. 118 (1997) 16

Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit,
507 U.S. 163 (1993) 6

McGhee v. Pottawattamie County, Iowa,
547 F.3d 922 (8th Cir. 2008) ..... *passim*

McGhee v. Pottawattamie County, Iowa,
475 F.Supp.2d 862 (S.D. Iowa 2007) ..... *passim*

Michaels v. New Jersey,
222 F.3d 118 (3d Cir. 2000), *cert. denied sub nom.*, *Michaels v. McGrath*, 531 U.S. 1118 (2001) 21, 22

Milstein v. Cooley,
257 F.3d 1004 (9th Cir. 2001) 17

Mitchell v. Forsyth,
472 U.S. 511 (1985) 6, 16

Monroe v. Pape,
365 U.S. 167 (1961) 13, 27

Mooney v. Hollohan,
294 U.S. 103 (1935) 26

Cited Authorities

Page

Moore v. Valder,
65 F.3d 189 (D.C. Cir. 1995) 17

Nike, Inc. v. Kasky,
539 U.S. 654 (2003) 24

Reno v. Flores,
507 U.S. 292 (1993) 25

Soldal v. Cook County,
506 U.S. 56 (1992) 27

Van de Kamp v. Goldstein,
555 U.S. __, 129 S. Ct. 855 (2009) 15

Wallace v. Kato,
549 U.S. 384 (2007) 29, 30, 31

Zahrey v. Coffey,
221 F.3d 342 (2d Cir. 2000) 22

UNITED STATES CONSTITUTION

U.S. Const. amend. IV 1, 7, 29, 31

U.S. Const. Amend. V 1, 7, 31

U.S. Const. Amend. XIV 1, 7, 31

Cited Authorities

Page

STATUTES

42 U.S.C. § 1983 (2006) ..... *passim*

42 U.S.C. § 1985 (2006) ..... *passim*

RULE

SUP. CT. R. 10 12

OTHER AUTHORITY

Stern, Gressman, Shapiro & Gellar, *Supreme Court Practice* § 4.18 (8th ed. 2002) 24

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides, in relevant part:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated * * *.

The Fifth Amendment to the United States Constitution provides, in relevant part:

> No person shall * * * be deprived of life, liberty, or property, without due process of law * * *.

The Fourteenth Amendment to the United States Constitution provides, in relevant part:

> No State shall make or enforce any law which shall * * * deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

INTRODUCTION

Petitioners through their patently unconstitutional and racially motivated conduct framed, arrested, prosecuted, and convicted Mr. Terry Harrington for a murder he did not commit. He suffered imprisonment for almost 26 years: from November 16, 1977 until April 17, 2003. Harrington spent from age 17 until age 43 in prison. The 18-year-old Terry Harrington testified at his own sentencing hearing after the 1978 trial:

> I just want you to know that no matter what happens, I know I'm innocent, and as long as, you know, I feel that inside, then I'm going to keep on fighting because I know I can't see myself locked up for the rest of my life for something I didn't do . . . . I feel I was judged by the color of my skin and not the content of my character, and I'll always feel that way until I get, you know, the kind of verdict the testimony shows, and that's innocent or not guilty as they would say in the courtroom.

Compl. ¶ 361. He simply had no idea just how many years that fight would last and in how many courtrooms it would proceed. The now 49-year-old Terry Harrington continues his struggle to remedy the rape of his constitutional rights through his present civil rights case.

During his years in prison, sentenced to life at hard labor without the possibility of parole, Harrington lost the society of his family, including his daughter, and friends. He lost his chance to marry and have more

children. He lost his chance to get an education and have a rewarding job. He lost the joys of a free life.

Terry Harrington still suffers today from the effects of petitioners' misconduct. He was thrown back into the world without money or the education or prospects that were open to him in 1977-78 or the intervening years of his incarceration. He continues to suffer the stigma, lost reputation, and diminished employment opportunity that comes with being a "convicted murderer," a scar he would not bear but for petitioners' unconstitutional misconduct.

Petitioners misstate the Eighth Circuit Court of Appeals holding in the panel rehearing opinion as: "a prosecutor is not immune for procurement of false evidence 'where the prosecutor was accused of *both* fabricating evidence *and then using the fabricated evidence at trial.*'" Pet. at 5 (emphasis in original). However, the following represents the actual holding:

> We find immunity does not extend to the actions of a County Attorney who violates a person's substantive due process rights by obtaining, manufacturing, coercing and fabricating evidence *before* filing formal charges, because this is not "a distinctly prosecutorial function." The district court was correct in denying qualified immunity to Hrvol and Ricther for their acts *before* the filing of formal charges.

Pet. App. A at 19a [*McGhee v. Pottawattamie County, Iowa*, 547 F.3d 922, 933 (8th Cir. 2008)] (emphasis added).

The Eighth Circuit explicitly "affirm[ed] the district court in all other respects[,]" *id.*, which held:

> With respect to the specific claims alleged, the Court finds the following:
>
> * As to Harrington's Count 1, a § 1983 claim for fabricated and perjured testimony against Defendants Hrvol, Richter, Brown, and Larsen, the pending motions are granted to the extent that the fabricated or perjured testimony was actually used at trial or in judicial proceedings. However, to the extent that the prosecutors fabricated and coerced evidence *prior to* the filing of the True Information, the pending motions are denied. The prosecutors are not entitled to absolute immunity, and neither the prosecutors nor the police defendants are entitled to qualified immunity on such claims.
>
> * As to Harrington's Count 2, a § 1983 claim for withheld *Brady* and *Giglio* evidence, the pending motions are granted. The prosecutors are entitled to absolute immunity and the police defendants are entitled to qualified immunity.
>
> * As to Harrington's § 1985 conspiracy claim, the pending motions are granted to the extent that the alleged conspiracy arises from the withholding of exculpatory evidence, but *denied to the extent the conspiracy is based on a lack of probable cause to arrest and on the fabrication/coercion of evidence.*

> * As to Harrington's state claims in Counts 4 (intentional infliction of emotional distress), 5 (malicious prosecution), and 6 (loss of parental consortium), the pending motions are granted with respect to the prosecutor Defendants to the extent the claims arise out of the withholding of exculpatory evidence. The pending motions are *denied to the extent the claims arise out of claims for arrest without probable cause and fabrication/coercion of evidence*. The pending motions by the police Defendants are denied.

Pet. App. B at 152a-153a [*McGhee v. Pottawattamie County, Iowa*, 475 F.Supp.2d 862, 927 (S.D. Iowa 2007)] (emphasis added). Petitioners miss the mark by baptizing their investigatory functions as prosecutorial functions ultimately used at trial and thereby converting them into advocatory functions deserving absolute immunity — this is not correct. Prosecutors would thus earn the protection of the Court for their wicked conduct if only they will use it in a judicial proceeding against a defendant. The district court and the circuit court granted the prosecutors absolute immunity for their post-True Information actions for § 1983 and § 1985 purposes as well as state claim purposes. Both courts granted the prosecutors absolute immunity in total for the *Brady* and *Giglio* counts. However, neither the district court nor the circuit court found any immunity for the prosecutors' investigatory functions for their pre-True Information actions under the facts and admissions in this case for § 1983 and § 1985 purposes and state claim purposes.

PROCEDURAL BACKGROUND

After untenable, unrelenting, always at the last moment, delay-inducing procedural efforts by defendants/appellants/petitioners in order to avoid trial in this three-decades-plus-old matter, this case prematurely comes before this Court under the collateral order authority[1] after summary judgment proceedings on immunity issues appealed[2] by only the prosecutor defendants David Richter and Joseph Hrvol. Pottawattamie County itself cannot raise any immunity affirmative defense, and the case will proceed against the county. *See Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 166 (1993) ("These decisions make it quite clear that, unlike various government officials, municipalities do not enjoy immunity from suit — either absolute or qualified under § 1983."). The police/city defendants did not pursue an interlocutory appeal on immunity issues. The current county attorney, Matthew D. Wilber also did not seek an interlocutory appeal on immunity issues relating to Harrington's separate causes of action against him.[3]

---

1. *See Mitchell v. Forsyth*, 472 U.S. 511, 524-27 (1985).

2. The panel rehearing decision, *McGhee v. Pottawattamie County, Iowa*, 547 F.3d 922 (8th Cir. 2008), reversed in part, and affirmed in part, the district court's decision, *McGhee v. Pottawattamie County, Iowa*, 475 F.Supp.2d 862 (S.D. Iowa 2007).

3. *See* S.D. Iowa Docket No. 4:03-cv-90616-RP-TJS; *Harrington v. Wilber*, 353 F.Supp.2d 1033 (S.D. Iowa 2005) (denying prosecutor summary judgment); *see also* Pet. App. A at 9a.

Petitioners seek review on certiorari of a decision on a limited interlocutory appeal of the partial summary judgment denial of absolute immunity on violations of Harrington's First, Fourth, Fifth, Sixth, and Fourteenth Amendment rights actionable under 42 U.S.C. §§ 1983 and 1985 (2006). This case does not merit this Court's review at this interlocutory stage under the summary judgment standard of review — particularly because petitioners admitted Harrington's stated facts and waived their probable cause arguments, and thus cannot support their expanded immunity arguments. *See* Pet. App. A at 10a-12a; Pet. App. B at 24a, n.1. Petitioners admitted they functioned as investigators when they procured false testimony. *See* Pet. at 19. Furthermore, the district court and the court of appeals rendered opinions that faithfully applied this Court's precedent.

Harrington steadfastly maintained his innocence and unrelentingly fought to challenge his unconstitutional conviction and denial of liberty and regain his freedom:

- After his conviction for first-degree murder, he directly appealed the conviction, but the Iowa Supreme Court affirmed it on October 17, 1979.

- He filed an application for post-conviction relief that the Iowa District Court ultimately denied on July 13, 1988

- The Iowa Court of Appeals affirmed the denial on January 25, 1990.

- He petitioned for a writ of habeas corpus, which the United States District Court for the District of Iowa denied on November 25, 1991.

- The Eighth Circuit Court of Appeals affirmed the denial on January 8, 1993 in *Harrington v. Nix*, 983 F.2d 872 (8th Cir. 1993).

- He filed a pro se Application for Post Conviction Relief on July 24, 1997, and filed an Amended and Substituted Post Conviction Petition on March 3, 2000, which the Iowa District Court denied on March 5, 2001.

- He appealed this denial, and the Iowa Supreme Court finally reversed his conviction and remanded his case for new trial based on *Brady v. Maryland*, 373 U.S. 83 (1963) due process violations based on newly-discovered, but previously withheld evidence relating to an alternate suspect, in *Harrington v. State*, 659 N.W.2d 509 (Iowa 2003), which ordered his conviction vacated and remanded the case to the Iowa District Court for new trial.

- The State of Iowa timely filed a Petition for Rehearing, which by court rule caused the Iowa Supreme Court not to issue its Writ of Mittimus.

- The Governor of Iowa, the Honorable Thomas Vilsack, on April 17, 2003, granted Harrington a reprieve until such time as the Iowa Supreme Court ruled on the petition for rehearing.

- The Iowa Supreme Court, on April 18, 2003, ruled on the petition for rehearing and thereafter issued its Writ of Mittimus to the Iowa District Court to vacate Harrington's wrongful conviction and to grant him a new trial.

- Because the Governor's Reprieve expired on the Iowa Supreme Court's issuance of its Writ of Mittimus, on April 30, 2003, Harrington voluntarily surrendered himself to the Pottawattamie County Sheriff.

- The Iowa District Court for Pottawattamie County on April 30, 2003 ordered Harrington's 1978 conviction and Sentencing Order vacated and released him from custody on bond and supervision.

- On October 24, 2003, without prejudice to its later re-filing the charge, the State of Iowa dismissed the murder charge against Harrington.

- On March 25, 2005, Harrington filed his present civil rights case under 42 U.S.C. §§ 1983 and 1985 to seek justice.[4]

---

4. Harrington filed his civil rights claims and supplemental state claims action in the United States District Court for the Southern District of Iowa on March 25, 2005, Docket No. 4:05-cv-00178-RP-TJS. As was the underlying 1978 murder trial, Harrington's current case is also separate from Curtis W. McGhee Jr.'s case, Docket No. 05-cv-90616, but was consolidated for discovery and trial, currently set for August 3, 2009, under Docket No. 03-cv-90616.

FACTUAL BACKGROUND

The district court opinion detailed the facts of this case, see Pet. App. B at 24a-47a [475 F.Supp.2d at 865-878], and Harrington's complaint thoroughly sets forth the egregious facts underlying his claims. Petitioners have conceded Plaintiff's version of the facts as set forth in the pleadings and in Plaintiff's summary judgment opposition, as recognized by the district court: "The Defendants, with very few exceptions, do not resist the facts as set forth in the Plaintiffs' Complaints for purposes of the pending motions." Pet. App. B at 24a n.1 [*McGhee*, 475 F.Supp.2d at 867 n.1]; *see also Harrington v. State*, 659 N.W.2d at 522. Richter and Hrvol admitted that they were working alongside police: "Petitioners do not dispute that the county attorneys were functioning as investigators at the time they allegedly procured false testimony against respondents; accordingly only qualified immunity applied." Pet. at 19. However, Richter and Hrvol did much more than merely procure false testimony, they personally conspired with the police in creating the manufactured, coerced, and fabricated evidence against Harrington and framing him for a murder he did not commit. In exercising their investigatory functions, they functioned as police officers who could only receive qualified immunity at best.

The prosecutors' actions not "intimately associated with the judicial phase of the criminal process" (actions before or after their prosecutorial or advocatory functions) do not merit immunity. *See Imbler v. Pachtman*, 424 U.S. 409, 430 (1976). This same functional approach applied to Wilber's press conference in the district court's decision in the

Harrington defamation case. *See Harrington v. Wilber*, 353 F.Supp.2d at 1046-47. The Eighth Circuit opinion noted that courts fundamentally agree that "[i]mmunity is absolute only when the prosecutor performs distinctively prosecutorial functions." Pet. App. A at 19a [*McGhee*, 547 F.3d at 933] (citation omitted). As they must, petitioners themselves agree with this proposition: "It is well established that a prosecutor does not have absolute immunity during the *investigative* phase of a criminal proceeding, and that absolute immunity during the *judicial* phase does not 'retrospectively' immunize earlier wrongful acts." Pet. at 18 (emphasis in original).

Petitioners' reasoning cannot extend as far as they allege without gutting this Court's prosecutorial immunity functional approach precedent and granting all prosecutorial investigatory functions absolute, rather than qualified, immunity.

REASONS FOR DENYING THE PETITION

I. No Circuit Split Exists

The petitioners' request that this Court step in at this early stage in the proceedings is fundamentally misguided. Petitioners' assertion that there is a conflict among the circuits is incorrect, and in the absence of a conflict the issue is merely one of application of this Court's prosecutorial immunity precedent to a unique set of facts. Review of the fact-bound determination is unwarranted.

Petitioners did not argue the false circuit split in their petitions for rehearings (panel or en banc). Those petitions focused on Eleventh Amendment and state tort claims act issues, without the emphasis placed on the constitutional issues presented here. Petitioners did not question Harrington's right to go to trial on his civil rights claims in footnote 2 of those petitions for rehearing. Petitioners recognized that, even if their petition succeeded on the state law claims, they would still face the federal civil rights claims: They admitted in a footnote that winning their sovereign immunity argument would leave the federal civil rights claims intact. *See* Pet. For Reh'g at n.2. On November 21, 2008, the panel decided the petition for rehearing. Petitioners serially raise alternative theories in a relentless effort to avoid trial.

Under this Court's Rule 10, the Eighth Circuit's application of the "properly stated rule of law" of *Buckley* to the particular allegations of Harrington's complaint is not a question worthy of a grant of certiorari. Petitioners' contrary claim that this fact-bound and interlocutory ruling merits review by this Court rests principally on the contentions that it conflicts with the holdings of the Third and Seventh Circuits. Review of the decisions petitioners cite, however, reveals that the "conflict" is illusory.

Petitioners argue that they are entitled to absolute prosecutorial immunity under *Buckley v. Fitzsimmons*, 20 F.3d 789 (7th Cir. 1994), *cert. denied*, 513 U.S. 1085 (1985) ("*Buckley II*"). Petitioners claim that there is a conflict among the circuits, and that this Court is likely to take this case to resolve that conflict. This claim is

false, particularly after review of the underlying facts in the cases petitioners cite.

On remand from this Court, *Buckley II* applied a qualified immunity analysis and did not need to apply the absolute immunity analysis from this Court's decision in *Buckley v. Fitzsimmons*, 509 U.S. 259 (1993). Importantly, *Buckley II* involved facts fundamentally different from those present here — the Seventh Circuit analyzed a situation in which the prosecutors who conspired to manufacture false evidence that would link boot print evidence to Buckley and who coerced and paid for witness testimony against Buckley under their investigatory functions were not all the same prosecutors who presented the evidence under their advocatory functions before the grand jury or at trial. *See Buckley II*, 20 F.3d at 800. *Buckley II* focused on causation. The Eighth Circuit here analyzed the situation where the prosecutors did not change, and thus, no causal break merits the same *Buckley II* qualified immunity distinction. In conformance with the functional approach announced in *Imbler*, 424 U.S. at 431, this Court held in *Buckley* that prosecutors have the same qualified immunity as police when they function like police, i.e., as investigators.

Police have no immunity when they lack probable cause to believe the plaintiff is guilty of a crime and fabricate evidence to frame the plaintiff, and neither do prosecutors. *Buckley*, 509 U.S. at 273. Police are liable for all of the natural consequences of their unconstitutional conduct during a criminal investigation, and so are prosecutors. *Id.* In *Monroe v. Pape*, 365 U.S. 167, 171 (1961), this Court held that § 1983 "should be

read against the background of tort liability that makes a man responsible for the natural consequences of his actions." 365 U.S. at 187. If the same prosecutors who violated the person's constitutional rights when they functioned as investigators initiate a prosecution, then those same prosecutors cannot launder their previous investigative functions by retroactively invoking their later-adopted prosecutorial functions.

The functional approach rationally interprets prosecutorial immunity. In *Clinton v. Jones*, 520 U.S. 681, 693 (1997), the Court stated: "In cases involving prosecutors, legislators, and judges we have repeatedly explained that the immunity serves the public interest in enabling such officials to perform their designated functions effectively without fear that a particular decision may give rise to personal liability." Prosecutors do not have to function as investigators; and "there is no common-law tradition of immunity for [fabrication of evidence], whether performed by a police officer or prosecutor." *Buckley*, 509 U.S. at 274.

Absolute immunity does not apply to prosecutors' actions taken outside their advocatory functions. *Imbler*, 424 U.S. at 424. Except as to personnel budget, or investigation, prosecutors' duties embrace advocacy. While absolute immunity attaches to a prosecutor's advocatory conduct, the fact remains that *Imbler's* immunity rule does not reach all duties of a prosecutor. While *Imbler* refused to delineate the boundaries of a prosecutor's duties beyond which absolute immunity would not extend, this Court emphasized that immunity was not limited to the prosecution function performed inside the courthouse door: "We recognize that the

duties of the prosecutor in his role as advocate for the State involve actions preliminary to the initiation of a prosecution and actions apart from the courtroom." *Imbler*, 424 U.S. at 431 n.33. The Court very recently approved the *Imbler* function test and embraced the fact that prosecutors do not receive absolute immunity in section 1983 actions that do not involve "acting as an 'officer of the court,' but is instead engaged in other tasks." *Van de Kamp v. Goldstein*, 555 U.S. ___, 129 S. Ct. 855, (2009).[5] This Court reviewed its holdings since *Imbler*, namely:

> that absolute immunity does not apply when a prosecutor gives advice to police during a criminal investigation, see *Burns*, *supra*, at 496, when the prosecutor makes statements to the press, *Buckley v. Fitzsimmons*, 509 U.S. 259, 277 (1993), or when a prosecutor acts as a complaining witness in support of a warrant application, *Kalina*, *supra*, at 132 (Scalia, J., concurring).

Id. at 861. This reasoning voids petitioners' arguments for wholesale absolute immunity.

---

5. The first case to cite this decision granted absolute immunity to the special prosecutor based on distinguishable facts that focused on the prosecutor's advocatory functions (not at issue in the present case), but recognized that if the prosecutor has "acted as an investigator, he would not be cloaked with absolute immunity, but he may be entitled to qualified immunity." *See Aretakis v. Durivage*, No. 1:07-CV-1273, 2009 WL 249781, at *17 (N.D.N.Y. Feb 03, 2009) (also discussing Second Circuit prosecutorial immunity functional approach cases at *15).

Other decisions made by this Court have also reaffirmed *Imbler's* functional approach, sustaining absolute immunity for a prosecutor when performing an advocatory function, but disallowing it when the conduct is divorced from, or only tangentially linked, to that function. *See Mitchell v. Forsyth*, 472 U.S. 511, 521 (1985) (noting Attorney General denied absolute immunity for allegedly authorizing illegal wiretapping in furtherance of national security); *Burns v. Reed*, 500 U.S. 478, 493 (1991) (concluding absolute immunity applied to a prosecutor's conduct of a probable cause hearing but not when giving legal advice to the police prior to arrest during the investigative phase of the criminal case); *Buckley*, 509 U.S. at 274-76 (1993) (holding absolute immunity denied to prosecutor who allegedly fabricated evidence during investigation well before grand jury and arrest, and made statements in a press conference after indictment); *Kalina v. Fletcher*, 522 U.S. 118 (1997) (denying absolute immunity to prosecutor who acted as witness, not advocate, by certifying affidavit in support of search warrant).

Other courts also apply similar reasoning based on this Court's controlling precedent. The Ninth Circuit Court of Appeals explained: "Although we focus on the administrative nature of Gammick's and Helzer's conduct, by attempting to dictate the manner in which future investigations should be staffed and conducted, the prosecutors were likely engaging in an investigative rather than a judicial function." *Botello v. Gammick*, 413 F.3d 971, 977 n.5 (9th Cir. 2005) (citing *Buckley*, 509 U.S. at 273 ("When a prosecutor performs the investigative functions normally performed by a detective or police officer, it is neither appropriate nor

justifiable that, for the same act, immunity should protect the one and not the other") (internal quotation marks omitted)); *see also Milstein v. Cooley*, 257 F.3d 1004 (9th Cir. 2001) (denying absolute immunity to a prosecutor who fabricated evidence before charges were filed). The Third Circuit also looked at scope of prosecutors' duties in determining immunity. *See Carter v. City of Philadelphia*, 181 F.3d 339, 356-357 (3d Cir.), *cert. denied*, 528 U.S. 1005 (1999) (concluding no absolute immunity for district attorney supervisor's failure to set police and district attorney policy and training to discourage police perjury and procurement of false eyewitness testimony and to discipline offenders). The D.C. Circuit found that intimidating and coercing witnesses into changing their testimony is not an advocatory function, but rather a "misuse of investigative techniques" that relate to typical police functions. *Moore v. Valder*, 65 F.3d 189, 195 (D.C. Cir. 1995). Thus, when prosecutors assume the role of and function as law enforcement they act outside any judicial or quasi-judicial prosecutorial function and absolute immunity cannot apply.

In the present case, Harrington's § 1983 and § 1985 claims arise from the petitioners' admittedly investigatory functions before they were exercising advocatory functions. The unique and admitted facts in this case distinguish it from many other prosecutorial immunity cases and merit the distinct analysis provided by the district and circuit courts.

After exhaustive factual and legal review, the opinions already issued regarding the immunity issues presented in this case have resolved the immunity

questions in accordance with this Court's precedent and the great weight of other circuit court precedent, albeit not to the petitioners' liking.

This Court has specifically held the fact that prosecutors' use of the fabricated evidence later in immunized proceedings does not relieve them of liability for their misconduct during the investigation:

> A prosecutor may not shield his investigative work with the aegis of absolute immunity merely because, after a suspect is eventually arrested, indicted, and tried, that work may be retrospectively described as "preparation" for a possible trial; every prosecutor might then shield himself from liability for any constitutional wrong against innocent citizens by ensuring that they go to trial. When the functions of prosecutors and detectives are the same, as they were here, the immunity that protects them is also the same.

Buckley, 509 U.S. at 276. Prosecutors may not be liable for the act of using the false evidence in court, but they remain liable for the fabrication of that evidence during the investigation — just like the police. *Id.* at 276. This Court also warned against petitioners' attempted construct: "Almost any action by a prosecutor, including his or her direct participation in purely investigative activity, could be said to be in some way related to the ultimate decision whether to prosecute, but we have never indicated that absolute immunity is that expansive." *Burns*, 500 U.S. at 495. Petitioners explicitly recognize this fact: "It is well established that a

prosecutor does not have immunity during the *investigative* phase of a criminal proceeding, and that absolute immunity during the *judicial* phase does not 'retrospectively' immunize earlier wrongful acts." (Pet. at 18, emphasis in original). Petitioners, however, contort this precedent by making the incorrect argument that the fabricated evidence used at trial immunizes prosecutor misconduct during the investigation. *Id.* at 15. Regardless, the function test does not provide for the wholesale absolute immunity petitioners desire. To reach this result, this Court would have to abandon decades of precedent contrary to stare decisis principles. If a claim is "well embedded in the law" this Court has stated: "considerations of stare decisis strongly support our adherence to that view. And those considerations impose a considerable burden upon those who would seek a different interpretation that would necessarily unsettle many Court precedents." *CBOCS West, Inc. v. Humphries*, __ U.S. __, __, 128 S. Ct. 1951, 1958 (2008).

The Eighth Circuit's decision accords with this Court's decision in *Buckley*. Indeed, the circuit court properly applied this precedent: "Before the establishment of probable cause to arrest, a prosecutor generally will not be entitled to absolute immunity." Pet. App. A at 11a [*McGhee*, 547 F.3d at 929] (citing *Buckley*, 509 U.S. at 274, "A prosecutor neither is, nor should consider himself to be, an advocate before he has probable cause to have anyone arrested."). This precedent undermines petitioners' absolute immunity arguments. Petitioners *admitted* for the purposes of this appeal that Hrvol and Richter lacked probable cause to believe that Harrington was guilty of the Schweer

murder.[6] Petitioners also *admitted* that Hrvol and Richter were working hand-in-hand with police to fabricate evidence to frame innocent African-American teenagers for that murder, and it cannot be denied that Harrington served an unconscionable prison term as a result. These facts clearly state a § 1983 claim and a § 1985 claim against the prosecutors for which they have no immunity for their investigatory functions.

Petitioners' reliance on *Buckley II* simply fails to support their arguments. In *Buckley II*, after this Court's remand, two judges of the Seventh Circuit under a qualified immunity analysis, as directed by this Court, held that Buckley failed to state a claim against the prosecutors for the alleged payment for and coercion of witness testimony that inculpated the plaintiff in a murder case. 20 F.3d at 796. They reasoned that Buckley was not injured by the false statements. *Id.* Indeed, this Court expressly rejected what petitioners argue *Buckley II* stands for in the *Buckley* decision. 509 U.S. at 274. The *Buckley II* court likewise realized that "[i]mmunity for prosecutorial deeds does not whitewash wrongs completed during the investigation." 20 F.3d at 796. *Buckley II* plainly does not stand for the proposition petitioners forward. The harm in the case at bar differs from the lack of harm in the *Buckley II* case because the petitioners' affirmative investigatory acts went beyond coercing and paying for witness testimony and violated Harrington's rights without any causal break.

---

6. Petitioners waived any argument to the contrary. *See* Pet. App. A at 11a-12a [*McGhee*, 547 F.3d at 929].

The district court and the circuit court recognized a violation of Harrington's substantive due process rights before the petitioners engaged in advocatory functions. The distinction in Harrington's case is that the prosecutors who concocted the evidence remained the same before and after trial — unlike some of the prosecutors in *Buckley II*. *See* 20 F.3d at 800. No causal break as to the location of the injury occurred in the present case, thus the prosecutors here cannot whitewash wrongs initiated during the investigation.

The Seventh Circuit's 1994 decision in *Buckley II* and the Third Circuit decision adopting its reasoning, *Michaels v. New Jersey*, 222 F.3d 118 (3d Cir. 2000), *cert. denied sub nom. Michaels v. McGrath*, 531 U.S. 1118 (2001),[7] comply with this Court's precedent — but only as regards immunity for prosecutors' advocatory functions — not at issue in the present appeal. They

---

7. Justice Thomas wrote in his dissent to the Court's denial of certiorari:

> In *Zahrey*, the Second Circuit took the position that a plaintiff does state a claim under § 1983 when he shows that prosecutorial misconduct in gathering evidence has led to a deprivation of his liberty. The intervention of a subsequent immunized act by the same officer does not break the chain of causation necessary for liability.
>
> I believe that the Second Circuit's approach is very likely correct, and that the decision below [*Michaels*] leaves victims of egregious prosecutorial misconduct without a remedy. . . .

531 U.S. at 1118.

are based in part on the view that, when a witness is coerced to testify falsely against the plaintiff at trial, only the witness's constitutional rights are violated, not the plaintiff's. *Buckley II*, 20 F.3d at 794-795; *Michaels*, 222 F.3d at 122. *Buckley II* and *Michaels* are further distinguishable from this case in that the defendants in those cases did not admit that they lacked probable cause to believe that the plaintiff was guilty of the crime, and did not admit that they themselves fabricated evidence and coerced testimony before probable cause existed. However, petitioners admitted those facts for the purposes of this appeal. The Second Circuit's opinion, *Zahrey v. Coffey*, 221 F.3d 342 (2d Cir. 2000), fits the facts and causation in the present case. *Buckley II* and *Michaels* simply do not represent the circuit split petitioners allege.

The paucity of relevant cases cited by petitioners is ironic given their assertion that the issue presented is a "critical issue" (Pet. at i, 2) on which "the circuits are divided." Pet. at 2. In the more than thirty years since *Imbler* was decided, petitioners can point to only two federal appellate decisions that present even vaguely similar issues. The most recent case they cite is the nearly decade old *Michaels* case. "Unlike decisions of this Court, decisions of the courts of appeals, even when unanimous, do not carry stare decisis weight, nor do they relieve us of our obligation independently to decide the merits of the question presented." *CBOCS West, Inc.*, __ U.S. at __, 128 S. Ct. at 1970 (Thomas, J., dissenting).

In sum, the specific factual difference between *Buckley II* and *Michaels* and the present case cannot support finding a circuit split. Nor is there any reason

to believe that this Court is likely to abandon its functional approach precedent to find that prosecutors who admit they lacked probable cause and fabricated evidence during an investigation are entitled to absolute immunity from § 1983 and § 1985 liability as petitioners wish. The district court opinion thoroughly, and properly, analyzed the precise issue that petitioners raise:

> The Court finds the reasoning of *Zahrey and Thomas* [*Thomas v. Sams*, 734 F.2d 185 (5th Cir. 1984)], compelling and adopts the reasoning contained therein in its conclusion that the prosecutors' alleged fabrication/coercion of evidence caused Plaintiffs' deprivation of liberty by denying them due process, despite the fact that the prosecutors' acts of using the fabricated/coerced evidence *at trial* is shielded by absolute immunity. *Wilson*, 260 F.3d at 954 ("If officers use false evidence, including false testimony, to secure a conviction, the defendant's due process is violated."). Plaintiffs have, therefore, asserted a cognizable violation of their own constitutional or statutory rights.

Pet. App. B at 112a [*McGhee*, 475 F.Supp.2d at 908] (emphasis in original). The district court, and the circuit court through its affirmance, properly applied the function test to the distinct and admitted facts presents in this case to divide the prosecutors' actions among the different immunity levels.

Finally, even if the Court were interested in addressing whether and under what circumstances the investigatory functions of a prosecutor merit absolute

immunity, the interlocutory posture of this case would make it a poor choice as a vehicle for deciding such issue. Proceedings on remand could yet obviate the need to address the function test altogether if Harrington does not succeed in proving his case. More importantly, even positing (as we do) that Harrington will be able to prove the allegations of his complaint, a factual record disclosing exactly what the investigative functions or adjudicative functions were in the circumstances of this case would contribute to a more informed decision on the application of the *Buckley* principles in a concrete factual setting. This case is, therefore, an obvious candidate for application of this Court's normal practice of not granting certiorari to review an interlocutory ruling of a federal court of appeals. *See* Stern, Gressman, Shapiro & Gellar, *Supreme Court Practice* § 4.18, at 258 (8th ed. 2002). Without more development in the court below, the Eighth Circuit's ruling in this case is still too preliminary for review "given the interlocutory posture of this case." *Nike, Inc. v. Kasky*, 539 U.S. 654, 659 (2003).

II. Petitioners' Substantive Due Process Argument Is Meritless

Petitioners argue at length that the Eighth Circuit erred in failing to evaluate Harrington's claims under the proper constitutional standard. Indeed, petitioners go so far as to claim that the both the district court and circuit court dispensed completely with a particularized constitutional right violation analysis. Pet. at 12. According to petitioners, the Eighth Circuit omitted this review and cut out of whole cloth a new substantive due process right, but petitioners' assertion is obviously

incorrect. "'The touchstone of due process is protection of the individual against arbitrary action of government.'" *County of Sacramento v. Lewis*, 523 U.S. 833, 845 (1998) (quoting *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974)). The Due Process Clause includes a substantive component that "bar[s] certain [arbitrary wrongful] government actions regardless of the fairness of the procedures used to implement them." *Daniels v. Williams*, 474 U.S. 327, 331 (1986).

Petitioners argue against the substantive due process rights found in this case and state that in addition to conflicting with Seventh Circuit law, which does not govern this action, finding "such a 'substantive due process' right against procurement of false evidence, far from being 'clearly established,' has no basis in this Court's precedents." Pet. at 8. This Court's decision in *Reno v. Flores*, 507 U.S. 292 (1993) belies petitioners' assertion. Notably, *Reno* analyzed the

> line of cases which interprets the Fifth and Fourteenth Amendments' guarantee of "due process of law" to include a substantive component, which forbids the government to infringe certain "fundamental" liberty interests at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest.

Id. at 301-02 (citing *Collins v. Harker Heights*, 503 U.S. 115, 125, (1992); *United States v. Salerno*, 481 U.S. 739 (1987); *Bowers v. Hardwick*, 478 U.S. 186, 191 (1986)). Harrington carefully described clearly established constitutional rights, long recognized since at least

Mooney v. Hollohan, 294 U.S. 103 (1935) (finding a prosecutor's knowing use of perjured testimony violates the Fourth Amendment), which petitioners violated as denials of his fundamental liberty interests; he pleaded: freedom of association under the First Amendment; his right to due process, a fair trial and equal protection guaranteed to him by the Fourth, Fifth, Sixth, and Fourteenth Amendments in addition to his rights against unreasonable seizures of his body guaranteed to him by the Fourth Amendment as well as a distinct conspiracy claim. Justice Scalia's concurrence in *Buckley* described that prosecutors' "knowing *use* of fabricated evidence before the grand jury and at trial. . . might state a claim for denial of due process[,]" but concluded that defamation immunity provided complete protection from the § 1983 suit. *Buckley*, 509 U.S. at 281 (Scalia, J. concurring) (citing *Mooney*) (emphasis in original). This recognition carries through to the temporal line drawn by the district court as affirmed by the circuit court wherein prosecutors would not receive complete protection for investigatory functions effectuated before the judicial process. Harrington's rights fall under the protections of the substantive due process clause as recognized by this Court's precedents.

Of course, the plurality *Albright v. Oliver*, 510 U.S. 266 (1994) decision requires more than a generalized notion of substantive due process; the decision explained "the first step in any such claim [§ 1983] is to identify the specific constitutional right allegedly infringed." 510 U.S. at 271. The limited claim pleaded in *Albright* "to be free from prosecution except on the basis of probable cause" did not meet this Court's criteria for a case in which substantive due process rights have been

recognized, *id.* at 272, and substantially differs from the numerous claims at issue here. Further, in *Albright*, no criminal sentence ensued because the indictment was dismissed and the only liberty interest deprivation consisted of the pretrial arrest period. Thus, clearly the Fourth Amendment applied rather than substantive due process. *Id.* at 275. The facts at issue in *Albright* do not compare in kind to the present facts that represent the type of arbitrary authority by the government that the substantive due process clause seeks to restrict. The Eighth Circuit properly found that the pleadings in total set forth a proper substantive due process violation.

In *Monroe v. Pape*, 365 U.S. at 171, this Court held that § 1983's purpose is clear from its title: "An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other Purposes." Substantive due process perfectly fits this case to further § 1983's broad, remedial purposes.

Thus, the issue before the Eighth Circuit was not that Harrington had alleged a *Brady* violation (a procedural due process violation), because no one could possibly doubt that he had based on the Iowa Supreme Court's finding, but rather whether he had alleged a basis for holding petitioners liable for the other violations of his civil rights. As the Eighth Circuit correctly understood, but petitioners apparently do not, that question turned on whether the challenged functions were investigatory or advocatory. "Certain wrongs affect more than a single right and, accordingly can implicate more than one of the Constitution's commands." *Soldal v. Cook County*, 506 U.S. 56, 70 (1992). In short, the circuit court held that Harrington

had adequately alleged that the petitioners' "obtaining, manufacturing, coercing and fabricating evidence before filing formal charges" functions were investigatory and that they had resulted, in his case, in a deprivation of his substantive due process rights (a deprivation whose existence is further supported and confirmed by his successful post-conviction review efforts). Pet. App. A at 19a.

The liberty interests denied Harrington by the petitioners illustrate the inherent value in substantive due process clause:

> the traditional and common-sense notion that the Due Process Clause, like its forebear in the Magna Carta, was "intended to secure the individual from the arbitrary exercise of the powers of government [.]" . . . [B]y barring certain government actions regardless of the fairness of the procedures used to implement them, it serves to prevent governmental power from being "used for purposes of oppression."

Daniels, 474 U.S. at 331 (citations omitted) (quoting *Hurtado v. California*, 110 U.S. 516, 527 (1884) and *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 277 (1856)). Substantive due process appropriately applies to "*deliberate* decisions of government officials to deprive a person of life, liberty, or property." *Daniels*, 474 U.S. at 331 (emphasis in original). "The touchstone of due process is protection of the individual against arbitrary action of government." *Dent v. West Virginia*, 129 U.S. 114, 123 (1889).

Petitioners also raise an inapplicable, as applied to the facts and law of this case, statute of limitations issue based on *Wallace v. Kato*, 549 U.S. 384 (2007), a Fourth Amendment accrual decision.[8] Further, petitioners' argument on this issue remains pending before the district court and petitioners did not appeal this issue. Neither the district court nor the court of appeals has ruled on this issue and the petition for certiorari on this ground proves premature.

Petitioners' argument, too, rests on a fundamental misunderstanding of *Wallace* and *Heck v. Humphrey*, 512 U.S. 477 (1994). Under petitioners' assertions, all arrestees would have to raise any potential false arrest claims within the applicable statute of limitations period running from the date of the arrest — even if the arrestee does not yet know or have proof that the arrest is "false." The fact-bound *Wallace* holding would not apply in a situation like Harrington's, as Justice Ginsburg's concurrence in *Albright* presciently elucidated:

> Once it is recognized, however, that Albright remained effectively "seized" for trial so long as the prosecution against him remained pending, and that Oliver's testimony at the preliminary hearing, if deliberately misleading, violated the Fourth Amendment by perpetuating the seizure, then the

---

8. This Court recently denied certiorari in *DeReyes v. Wilkins*, 528 F.3d 790 (10th Cir. 2008), *cert. denied*, __ S. Ct. __, 2009 WL 498175 (March 2, 2009), which presented the Fourth Amendment accrual issue against police defendants.

> limitations period should have a different trigger. The time to file the § 1983 action should begin to run not at the start, but at the end of the episode in suit, *i.e.*, upon dismissal of the criminal charges against Albright.

510 U.S. at 280. *Heck* governs the present case because Harrington could not bring his civil rights claims stemming from the claims that would render his conviction invalid until after his conviction was overturned. 512 U.S. at 486-87. *Wallace* does not govern the present case because the false arrest in *Wallace* was made without probable cause and without warrant, but then proper process followed to cure the earlier defect. Fabricated evidence, disregarded evidence, and coerced testimony caused Harrington's arrest, conviction, and wrongful incarceration. The present case amply illustrates how an arrestee may be unable to prove the falsity of the arrest. Indeed, the concealed police reports pointing to another suspect were not discovered until 1999, *nearly two decades after* Harrington's November 16, 1977 arrest and May 8, 1978 True Information, and only then by someone voluntarily operating independently of the justice system in Harrington's interest. *Harrington v. State*, 659 N.W.2d at 518. Additionally, the witness recantations of the false testimony fabricated and coerced by petitioners "could not have been discovered earlier in the exercise of due diligence." *Id.* at 517. Were this Court to adopt petitioners' reasoning, a vast increase in fruitless filings to potentially preserve statutes of limitations would unnecessarily impact the court system.

Furthermore, Fourth Amendment false arrest claims are not the sole claims Harrington brings against petitioners as was the *Wallace* situation. To be sure, Harrington pleaded intentional violations of: his right to freedom of association guaranteed to him by the First Amendment, his right to due process, a fair trial and equal protection guaranteed to him by the Fourth, Fifth, Sixth, and Fourteenth Amendments in addition to his rights against unreasonable seizures of his body guaranteed to him by the Fourth Amendment as well as a distinct racially-motivated conspiracy claim. Therefore, these additional reasons instruct why petitioners' false arrest statute of limitation argument neither applies to the present case nor merits this Court's review.

CONCLUSION

Despite petitioners' best efforts to eliminate the functional approach and expand wholesale prosecutorial immunity, no issue worthy of this Court's review can be teased out of this case. The Eighth Circuit's holding that the function test under *Buckley* precludes absolute immunity for the investigatory functions petitioners undertook in this case to deny Harrington his constitutional rights properly applied this Court's precedents and in no way departed from this Court's precedent. No real circuit split exists; and this appeal is in any event interlocutory in nature. Petitioners' substantive due process argument reflects a basic misunderstanding of this Court's teachings, and its statute of limitations arguments show an equally fundamental misunderstanding of civil rights law. The August 3, 2009 trial remains the proper place to address the remaining issues.

For the foregoing reasons, Harrington respectfully requests that this Court deny the Petition for a Writ of Certiorari.

Respectfully submitted,

J. DOUGLAS MCCALLA
Counsel of Record
MEL C. ORCHARD, III
LARISSA A. MCCALLA
THE SPENCE LAW FIRM, LLC
P.O. Box 548
15 S. Jackson St.
Jackson, WY 83001
(307) 733-7290

Attorneys for Respondent
Terry J. Harrington